In the Supreme Court
OF THE
United States

OCTOBER TERM, 1978

No. 78-221

SIERRA TERRENO, a Limited Partnership, CAL-PACIFIC RESOURCES, INC., WALTER E. BLOOM, et al.,
Petitioners,

vs.

TAHOE REGIONAL PLANNING AGENCY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal of the State of California,
Third Appellate District

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INTRODUCTION

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Third Appellate District, entered on March 15, 1978, in which a hearing was denied by the Supreme Court of the State of California on May 11, 1978.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Third Appellate District, is printed in Appendix A hereto and is reported at 79 Cal. App. 3d 439, 144 Cal. Rptr. 776.

JURISDICTION

The judgment printed in Appendix A hereto, which is sought to be reviewed, is dated March 15, 1978. A rehearing by the Court of Appeal, Third Appellate District, was denied on April 4, 1978. A hearing in the California Supreme Court was denied on May 11, 1978.

The jurisdiction of this Court is invoked under Section 1257(3) of Title 28 of the United States Code.

QUESTIONS PRESENTED

Does the constitutional guarantee of just compensation for the taking of private property for public use allow petitioners a cause of action for such payment following the imposition of a zoning ordinance which deprives them of all reasonable use and enjoyment of their properties and which devotes such properties to public use?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the United States Constitution provides:

> . . .; nor shall private property be taken for public use, without just compensation.

This requirement applies to the states through the due process clause of Amendment XIV. *Foster v. City of Detroit,* 254 F. Supp. 655, aff. 405 F. 2d 138. California has recognized this effect. *City of Los Angeles v. Wolfe,* 6 C. 3d 326.

STATEMENT OF CASE

The Tahoe Regional Planning Agency is a separate legal entity created in 1969 by Congressional ratification of the compact between the States of California and Nevada. (Public Law 91-148, 83 Stats. 360). After the TRPA was given jurisdiction over the entire region it adopted the land use ordinance in question.

Petitioners own real property in the Tahoe area which, during petitioners' ownership, had previously been zoned, assessed and valued for industrial and commercial uses. The TRPA land use ordinance then reclassified petitioners' lands as "General Forest". Petitioners alleged that such classification allowed "no development whatsoever, except for minor improvements incident to outdoor recreation, and public and quasi-public uses, and with the exception that one single family residence could be built on a parcel of record."

Petitioners' Complaints alleged that such downzoning was motivated by the desire to devote the properties to public use, accomplished that purpose, and deprived appellants of all reasonable use, profit and enjoyment of their properties. It was also alleged

that TRPA has desired to acquire title or development rights to the properties, and the purpose of the down-zoning was to either reduce the value and forestall development of the properties pending acquisition or, if the properties could not be acquired, to nevertheless permanently devote them to public use. The exact amount of damages claimed was unascertained at the time of pleading and was left subject to later amendment. However, the complaints alleged: "By all of its said actions, defendant deprived plaintiffs of all reasonable use, profit and enjoyment of their property," and "Defendant's said actions had the immediate and continuing effect of depriving plaintiffs of substantially all the value of their properties. The value of said properties remaining after defendant's said actions was either nominal or no greater than 25% of the value of said properties before defendant's said actions." Finally, the complaints allege that the down-zoning itself constituted a "public project, the purpose of which was to either forestall or substantially decrease the amount of development which otherwise would have occurred in the Lake Tahoe Basin so as to devote the properties to general recreational scenic use to be enjoyed by the public at large." These were causes of action solely for just compensation as required by the constitutions of the State of California and the United States.

The Trial Court sustained demurrers without leave to amend and entered Judgment of Dismissal. Petitioners' appeal followed. Thus, this case came up at the initial pleading stage. The federal question de-

rived from the United States Constitution was raised in petitioners' Complaints which alleged:

> By all of its said actions, defendant deprived plaintiff of all reasonable use, profit and enjoyment of its property. Defendant has not offered just compensation for said taking and damaging of property, as it is required to do by the Constitutions of the State of California and the United States.

Thereafter, the United States Constitution, Fifth Amendment was cited in the appellate briefs.

REASONS FOR ALLOWANCE OF THE WRIT

A "taking" within the meaning of the constitutional guarantee can occur without a change in title or possession. *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393. This Court said in *Armstrong v. United States* (1960) 364 U.S. 40, 49, "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar government from forcing some people alone to bear public burdens which in all fairness and justice should be borne by the public as a whole." And, again, in *United States v. Willow River Power Co.* (1945) 324 U.S. 499, 502, the Court said, "The Fifth Amendment undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project."

Justice Holmes' famous admonition is as relevant today as when he stated it in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. at 416, that:

> In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. (Citations omitted.) We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

The nature of the public use for which the private property is taken or damaged has no bearing on the right of the owner to receive just compensation. Eminent domain proceedings are utilized not only for the acquisition of private property for highways and schools but also for "open-space" for public enjoyment. Thus, the plausible objectives of the Tahoe Regional Plan should have no more effect on the constitutional guarantee of just compensation than the benefits to be derived from a needed school or hospital.

It should follow that the *means* by which the public use is imposed should also have no bearing on the right of the owner to just compensation. For example, the State of California may deprive private property of access to public streets by the exercise of its power of eminent domain. *People v. Ricciardi* (1943) 23 C.2d 390. Where the State takes access without perfecting its right to do so, the owner has a cause of action in inverse condemnation. *Bacich v.*

Board of Control (1943) 23 C.2d 343, 352. Likewise, a State agency may acquire private property for "open-space" by the exercise of eminent domain. Cal. Govt. Code §§ 6953 and 51072. Where that particular public use is imposed by a zoning regulation, the owner's right to secure just compensation through an inverse action should be afforded no less dignity.

A zoning regulation may constitute the means by which a public use is imposed. In *Kissinger v. City of Los Angeles* (1958) 161 Cal. App. 2d 454, an unduly restrictive down-zoning was declared invalid upon the ground, among others, that "Said ordinance, if sustained, would constitute confiscation of plaintiff's property." (Page 455.) That down-zoning was from R-3 (multiple residential) to R-1 (single family residential). The alleged result was a diminution in value from $114,000 to $18,000. (Page 459.)

In *Sneed v. County of Riverside* (1963) 218 Cal. App. 2d 205, the Appellate Court reversed a judgment of dismissal after demurrers were sustained without leave to amend plaintiff's complaint seeking money damages in inverse condemnation resultant from a down-zoning ordinance. That case stands for the proposition that a cause of action in inverse condemnation may lie to recover money damages for an extremely restrictive zoning ordinance which damages private property for public use.

The police power and the power of eminent domain must be distinguished. Each has its source in the necessity of the government to act in the public

interest. However, the constitutional right to receive just compensation results only from an exercise of the power of eminent domain. Clearly, schools and parks are for the public good but one's property may not be taken for either purpose without compensation. If a parcel of property were zoned exclusively for park purposes or exclusively as a school playground, the purported regulation would, in fact, be an exercise in eminent domain. Distinguishing between the exercise of the two powers is not always easy. Which of the powers is being used does not necessarily appear from the form in which the community puts its action. Indeed, the entire concept of inverse condemnation arises from circumstances in which harsh regulation unduly invades private property.

Finally, this Court has recently granted certiorari in *Jacobson v. Tahoe Regional Planning Agency,* 558 F. 2d 928 and 556 F. 2d 1353. *Jacobson* presents issues similar to the present case, particularly in view of the fact that the "down-zoning" complained of by *Jacobson* was also to "general forest". Petitioners submit that certiorari should be granted them in order to allow their matter to be treated consistently with *Jacobson.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, August 4, 1978.

GARY R. RINEHART,
Counsel for Petitioners.

(Appendices Follow)

Appendices

Appendix A

(NOT TO BE PUBLISHED IN OFFICIAL REPORTS)

In the Court of Appeal
State of California
Third Appellate District

[El Dorado]

3 Civil 16389

Sierra Terreno, a Limited Partnership, Plaintiff and Appellant, vs. Tahoe Regional Planning Agency, State of California and County of El Dorado, Defendants and Respondents.	(Sup. Ct. No. 22217)
Cal-Pacific Resources, Inc., Plaintiff and Appellant, vs. Tahoe Regional Planning Agency, State of California and County of El Dorado, Defendants and Respondents.	(Sup. Ct. No. 22218)
Walter E. Bloom, et al., Plaintiffs and Appellants, vs. Tahoe Regional Planning Agency, State of California and County of El Dorado, Defendants and Respondents.	(Sup. Ct. No. 22219)

[Filed Mar 15, 1978]

Opinion

(See Concurring Opinion)

Plaintiffs, Sierra Terreno, etc., Cal-Pacific Resources, Inc., and Walter E. Bloom, et al., brought separate actions for inverse condemnation against the Tahoe Regional Planning Agency ("TRPA"). Plaintiff owned real property situated in El Dorado County which previously had been zoned, assessed and valued for primarily industrial and commercial uses. The TRPA adopted a land use ordinance and reclassified plaintiffs lands as "general forest" and for other uses much more restrictive than those previously allowed.

Plaintiffs, in their complaints, claimed that the down-zoning by the TRPA reduced the value of their property thereby depriving them of all its reasonable use, profit, and enjoyment without just compensation in violation of the California Constitution (art. I, § 9). Plaintiffs sought damages solely under the theory of inverse condemnation. A judgment of dismissal was entered by the trial court after defendants' consolidated demurrers were sustained without leave to amend. Plaintiffs appeal.

We conclude that an action for inverse condemnation cannot be maintained.[1] Accordingly, we affirm.

* * * * *

[1]Neither can it be maintained against the county or state. By our resolution of the demurrer issue we need not face the ancillary issues raised by plaintiffs.

We are convinced that HFH, Ltd. v. Superior Court (1975) 15 Cal.3d 508, controls. There, the Court held that the mere diminution in value of property due to the rezoning of that property for less intensive uses does not give rise to an action in inverse condemnation. (See also, Pinheiro v. County of Marin (1976) 60 Cal.App.3d 323, at p. 325.)

The actions of TRPA are challenged. The TRPA was created by an interstate compact set forth in Government Code section 66801. Article VI of the compact is the provision which details the agency's powers. The TRPA was given the power to enact regulations which would effectuate the adopted regional plans for the Lake Tahoe Basin. The TRPA is empowered to regulate, among other things, the water purity and clarity, subdivision, and zoning of the region. The TRPA was not given the power to condemn property for public use (art. VI).

The challenge fails. The mere adoption of a general plan with areas designated for acquisition cannot give rise to a claim for inverse condemnation. (Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal.3d 110, 119; Pinheiro v. County of Marin, supra, 60 Cal.App.3d at p. 325.) A party has no vested interest in a previous zoning classification of his property. (HFH, Ltd. v. Superior Court, supra, 15 Cal.3d, at p. 516; Pinheiro v. County of Marin, supra, 60 Cal.App.3d 323, at p. 325.) In this case the plaintiffs did not allege that any existing use of their land has been terminated by TRPA.

Plaintiffs allege on one hand that the actions of TRPA had deprived them of all reasonable use, profit and enjoyment of their properties; on the other hand, they concede in the pleadings that some value remained in the properties.[2]

The complaints stated that the remaining value was either nominal or no more than 25% of the former value. The plaintiffs did not allege that no value remained. At the hearing on the demurrer, counsel for the plaintiffs stated that the proof, as he then knew it, was that about 25% of the value remained.

Thus, we again see the similarity to *HFH*. There plaintiff had alleged that no reasonably beneficial use remained. It conceded that a value of $75,000.00 remained in the property (from the original $400,000.00). The Supreme Court held that the concession that value remained rebutted the allegation that there was no use for the property. (HFH, Ltd. v. Superior Court, supra, 15 Cal.3d at p. 512, fn. 2.) The Court further noted that the plaintiff did not allege that the property was not suited to be used for a purpose for which it had been rezoned. (*Ibid.*)

Zoning and rezoning present perplexing problems of economic and environmental gain and loss. While some gain others lose. It is the Legislature which must strike the proper balance. Within the limits set by *HFH* the courts will exercise their duty to protect

[2]These concessions bely the emphasis in plaintiff's brief that we deal with a taking of substantially all use, an issue left open by HFH, Ltd. v. Superior Court, supra, 15 Cal.3d 508.

the individual from improper governmental taking of or damage to property.

The judgment is affirmed.

Reynoso, J.

I concur:

Friedman, J.*

I concur under the compulsion of the majority opinion in HFH, Ltd. v. Superior Court (1975) 15 Cal.3d 508. I am constrained however to voice my agreement with the rationale expressed in the dissent by Justice Clark.

Evans, Acting P.J.

*Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

Appendix B

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

May 11, 1978

I have this day filed Order

Hearing Denied

In re: 3 Civ. No. 16389

Terreno

vs.

Tahoe Regional Planning Agency

Respectfully,
G. E. Bishel
Clerk